

# **EXHIBIT 21**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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**IN RE:**

**OWENS CORNING, et al.,**

**Debtors.**

**CHAPTER 11**

**Case Nos. 00-3837 to 3854 (JFK)  
(Jointly Administered)**

---

**WITNESS:**

**Dr. Joseph Gitlin**

**DATE:**

**December 17, 2004**

**LOCATION:**

**Washington, DC**

**TAKEN BY:**

**Caplin & Drysdale**

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2 FOR THE DISTRICT OF DELAWARE

3

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In re:

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Chapter 11

OWENS CORNING, et al.,

6

Debtors.

7

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Case Nos. 00-3837 to 3854 (JPF)

9

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14 DEPOSITION OF:

Dr. Joseph N. Gitlin

15 DATE:

December 17, 2004

16 LOCATION:

Washington, DC

17 LEAD:

Caplin & Drysdale

18 REPORTER:

Susan Ashe, RMR, CRR

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1 Dr. Henry.

2 Do you know whether Dr. Henry  
3 typically testifies for asbestos defendants?

4 A I don't know.

5 Q You're familiar with the concept of  
6 "interobserver variability"; correct?

7 A Yes.

8 Q And what does that mean?

9 A That is very common, to find that  
10 qualified physicians tend to differ in  
11 interpreting -- and I'll use the term "films."

12 There is whole other science  
13 here when we get into digital; but we'll talk  
14 about "films."

15 They tend to differ in their  
16 interpretation of abnormalities -- either  
17 false-positives or false-negatives, whichever  
18 way you want to look at it.

19 And in general, in science as  
20 well as the art of medical imaging  
21 interpretation, there is a difference of about  
22 20 percent.

23 Q In your 2002 deposition, you said  
24 that radiology is an art, not a science, and  
25 there is variation in the view of the reader in

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1 almost any examination that's looked at.

2 Do you still agree with that  
3 statement?

4 A Yes.

5 Q Are you familiar with the work by  
6 Ducatman, et al. --

7 A Yes.

8 Q -- that examined the B-reader  
9 intervariability in the context of examinations  
10 for the U.S. Navy?

11 A Yes.

12 MR. FINCH: Let's mark this as  
13 the next exhibit.

14 (Whereupon, Gitlin Deposition  
15 Exhibit No. 6 was marked for  
16 identification.)

17 THE WITNESS: It's labeled  
18 "August 1988," by the way.

19 BY MR. FINCH:

20 Q You do have Gitlin Exhibit 6 in  
21 front of you, Dr. Gitlin?

22 A Yes.

23 Q This is an August 1988 publication  
24 by Dr. Alan Ducatman and others, entitled  
25 "'B-Readers' and Asbestos Medical Surveillance."

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1 form.

2 A It's a hypothetical possibility.

3 Q Which you have not investigated;  
4 correct?

5 A Correct.

6 Q Just to sort of break it down in  
7 laymen's terms: You would agree with me, would  
8 you not, that if you went to a podiatrist's  
9 office you'd likely find a higher percentage of  
10 people in the waiting room who are complaining  
11 of sore feet than you would of people walking  
12 around on the street?

13 A Logically, yes.

14 Q And so, would you agree with me that  
15 the same sort of phenomenon can occur in  
16 asbestos litigation -- meaning that a much  
17 greater percentage of persons who file claims  
18 actually have asbestos-related disease than what  
19 you would expect from the total screened  
20 exposure population?

21 A Logically, yes.

22 Q Have you done any kind of study to  
23 determine whether doctors who often testify for  
24 asbestos defendants engage in a systematic  
25 underreading of X-rays?



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1 that were submitted, the initial B-readers for  
2 all of them are -- I mean, the initial readers  
3 for all them were done by B-readers?

4 A Oh, yes.

5 Q So you're not saying that those  
6 roughly 30 B-readers were not qualified or  
7 incompetent, are you?

8 A Oh, no.

9 Q And of the 30 B-readers, seven of  
10 them read more than 35 X-rays; is that right?

11 A Correct.

12 Q Do you know if any court has  
13 precluded any of the seven from testifying in an  
14 asbestos personal injury case, on the ground  
15 that they are incompetent or their testimony is  
16 unreliable?

17 A I don't know of any instance.

18 Q After you had gotten the 551 films,  
19 you -- there were some that you couldn't use for  
20 some reason; is that right?

21 A Right.

22 Q And so, you got down to the 492?

23 A Right.

24 Q Of the 492 individual claimants, do  
25 you know how many of that 492 at least one of

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1                   And then there were two  
2 consultants, 1/0 or greater, in nine cases. And  
3 so on.

4           Q       But --

5           A       Now, in the extreme case, which may  
6 make it clearly understood, if you go to the  
7 column headed "6" --

8                   MR. WELDON: What page are we  
9 on again?

10                   THE WITNESS: On 851 of the  
11 published report.

12           A       -- there was one instance where all  
13 six consultant readers said that there was 1/0  
14 or greater.

15                   So in addition to the initial  
16 reader that also said 1/0 or greater, all six  
17 consultants said yes.

18           Q       I still don't think that answers my  
19 question, or maybe I just don't understand the  
20 answer.

21                   Are you saying that if you sum  
22 up the column headed "1" on Table 4b on page  
23 851, that will tell you how many of the 492  
24 claimants -- at least one of the consultant  
25 B-readers believed that they had a 1/0 or

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1 greater ILO rating? Or is it some other  
2 calculation to do that?

3 A That calculation will do it, and  
4 there is another way of doing it.

5 From -- no. I can't do it  
6 from this table here.

7 Q Okay. So is it correct that 39 out  
8 of the 492, one of the consultant B-readers  
9 concluded they had a 1/0 or greater?

10 A Yes.

11 Q All right. What is a "kappa  
12 statistic"?

13 A It's a measure of agreement between  
14 one or more individuals on determining the value  
15 of a parameter in a statistical analysis.

16 Q Would you agree that a kappa  
17 statistic of greater than .75 indicates a high  
18 level of agreement?

19 A Yes.

20 Q And a kappa statistics of 1.0, for  
21 example, would mean an almost perfect agreement;  
22 correct?

23 A Yes. By definition, 1.0 is perfect.

24 Q A kappa statistic of .40 to .75  
25 would indicate fair agreement?

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1 do it this way:

2                               Going back to your article,  
3 which is in Gitlin 1, at various places you talk  
4 about kappa statistics -- first, the kappa  
5 statistic measuring the agreement among the six  
6 consultant readings.

7               A       Right.

8               Q       And then the kappa statistic when  
9 you add in the initial B-readers; correct?

10              A       Correct.

11              Q       Okay. For example, on page 849 of  
12 the article --

13              A       I've got it.

14              Q       -- in the second column, first full  
15 paragraph, you write: "The kappa statistic  
16 assessing agreement among the six consultant  
17 readers was .10 with a 95% confidence interval  
18 of .07-.12."

19                               This is the kappa statistic  
20 for film quality; is that correct?

21              A       This is -- Table 1d -- as usual, I  
22 have to go back two pages to find 1d, I think.

23                               1d is "...Chest X-ray Film  
24 Quality," yes.

25              Q       So what this shows is that the

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1 consultant B-readers have pretty poor agreement  
2 among themselves as to film quality; correct?

3 A Yes.

4 Q And then when you add the initial  
5 B-readers to that, it doesn't really change the  
6 agreement or lack of agreement that much;  
7 correct?

8 A Correct.

9 Q The next parameter that you measure  
10 after the film quality is the question: Is the  
11 X-ray film completely negative?

12 A Correct.

13 Q And there the consultant B-readers  
14 have a kappa statistic of .43; is that right?

15 I'm reading on page 850 your  
16 article.

17 A I'm trying to find that, that  
18 number.

19 That's Table 2d; and on kappa  
20 statistics -- well, it's .- -- yeah .43.

21 Q Which, I guess, is on the low end of  
22 fair agreement; correct?

23 A Yes, yes.

24 Q And then when you add the initial  
25 readers to that, the kappa statistic drops to

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1           Q       So there was a fair agreement  
2       between the initial B-readers and the consultant  
3       B-readers on the question of whether there were  
4       pleural abnormalities consistent with  
5       pneumoconiosis; is that right?

6           A       Right.

7           Q       Okay. On the last page -- not the  
8       last page, it's page 853, under the "Discussion"  
9       section --

10          A       Right.

11          Q       -- the second paragraph, the second  
12       sentence, you state:

13                       "The authors had no basis for  
14       determining how this group of workers  
15       represented the universe of asbestos claimants."

16                       Do you see that?

17          A       Yes.

18          Q       Do you still agree with that  
19       statement?

20          A       Yes.

21          Q       So you don't know how representative  
22       this group of asbestos claimants is, compared to  
23       the hundreds of thousands of asbestos claimants  
24       as a whole?

25          A       That's correct.

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1 College of Radiology. And he feels their  
2 responses were quite honest.

3 And in his recommendation of  
4 who to select from the larger list, it was a  
5 factor in his saying: We have people who are  
6 thought of or have a reputation for being  
7 associated with plaintiff cases. We have people  
8 who are associated with defendants. We have  
9 people who have never been involved at all.

10 And so, there is a range of  
11 association here.

12 Q Do you know if he asked any of them  
13 to provide prior depositions where they were  
14 questioned under oath about --

15 A Yes.

16 Q -- who they worked for?

17 A He did not.

18 Q He did not.

19 And I take it you didn't do  
20 that either; correct?

21 A Correct.

22 Q And so, do you know which, if any,  
23 of these seven consultant B-readers is a  
24 consultant for plaintiffs in asbestos  
25 litigation?

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1           A       I don't know.

2                   I know the one, according to  
3   Otha's conversation said, "I have a reputation  
4   for..."

5           Q       Was it Dr. Fraser; correct?

6           A       I honestly don't know, but it could  
7   be.

8           Q       All right.

9           A       In fact, that's a very interesting  
10   question, which, when I looked at my own table  
11   here before -- this Gitlin 9 -- I still can't  
12   tell you, because of the codes we gave these  
13   people, that "C1" is who and "C2" is who, by  
14   name, because of my intent not to know that in  
15   doing all this analysis.

16                   So for a moment there when you  
17   asked that question, I might go look at Fraser  
18   and see what his percentage of positives were;  
19   but I don't know which one he is.

20          Q       Okay. So is it fair to say, you  
21   relied on Mr. Linton to do the vetting to  
22   determine whether or not any of these seven  
23   consultant B-readers were people who principally  
24   consulted for defendants in asbestos litigation  
25   or not?



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1           A       For defendants or for plaintiffs?

2           Q       Yes.

3           A       I relied on his personal  
4 information, yes.

5           Q       Okay. And you know that he did not  
6 ask any of them for prior depositions or trial  
7 testimony, where they were under oath and  
8 responded to questions about who they had worked  
9 for in asbestos litigation?

10          A       Yes. He did not ask -- this was on  
11 a very professional and very long-term personal  
12 basis.

13                   He was quite confident he got  
14 straight answers. In fact that was part, as I  
15 mentioned earlier, of our agreement with the  
16 consultants -- that they would be anonymous,  
17 insofar as we had the power to keep them  
18 anonymous -- and then at some point, we had to  
19 respond and put it in writing -- and also, that  
20 they agreed to be totally blind to all the key  
21 elements of litigation. They didn't want to  
22 know about it, and they didn't.

23          Q       Okay. In paragraph 6 of your  
24 supplement report, you --

25          A       That's Gitlin 2.

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1 made by Dave Setter; and the way this is  
2 written, we did receive, in many cases, boxes  
3 directly from the providers of those films.

4 So that is the way I interpret  
5 that sentence right now.

6 Q Okay. So is it correct that  
7 Mr. Setter was the lawyer who arranged for all  
8 of the X-rays that were sent to Mr. Linton and  
9 you to be sent?

10 A In these seven groups, yes.

11 Q Yes. And these seven groups  
12 comprised the 492 cases or X-rays that your six  
13 consultant B-readers reviewed; right?

14 A Well, more than that; but there  
15 ended up being 492 suitable for analysis and  
16 publication, yes.

17 Q Okay. And Mr. Setter was the lawyer  
18 responsible for arranging for the X-rays that  
19 got to be delivered to you and Mr. Linton; is  
20 that right?

21 A And the reports.

22 Q And the reports.

23 A Often separately, but both were  
24 essential.

25 Q Okay. For the Mississippi Holder

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1 group, you got 30 plaintiffs' films and B-reads;  
2 right?

3 A Right.

4 Q This talks about a case called the  
5 "Estate of Charles Holder, et al. v.  
6 Westinghouse Electric Company..." in Jones  
7 County, Mississippi.

8 Do you know how many X-rays  
9 Mr. Setter or the lawyers that were working with  
10 him had access to in addition to the 30 films  
11 that they sent to you?

12 A No; but I've assumed all along  
13 that -- and the statement that was made here,  
14 that nobody made any cuts -- I'm sorry, I can't  
15 find it now in the paragraph -- oh, there it is,  
16 the last sentence: We were informed that the  
17 attorneys made no cut of the films produced or  
18 the -- "forwarded them, 'as is,' to Mr. Linton"  
19 for reading.

20 Q Well, do you understand one way or  
21 the other as to whether Mr. Setter or the other  
22 attorneys working with him had the ability to  
23 obtain X-rays for more than 30 plaintiffs  
24 involved in the Mississippi litigation?

25 A I have no knowledge of that.

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1           Q       So, they could have. You just don't  
2     know?

3           A       Right.

4           Q       And you don't know, if they had  
5     access to more X-rays, what selection criteria  
6     they used to send the 30 films to you?

7           A       That's correct.

8                         But I do know that Dave Setter  
9     made the statement that's here: The attorneys  
10    made no cuts of the films produced or the  
11    B-readers' initial reads, and forwarded them to  
12    us "'as is.'"

13                        He went to great lengths to be  
14    very specific about that.

15          Q       Well, it says here he made no cut of  
16    the films produced in the Estate of Charles  
17    Holder v. Westinghouse litigation.

18                        My question is: How do you  
19    know whether or not there were other X-ray films  
20    in other litigation in Mississippi that  
21    Mr. Setter had access to?

22          A       I don't know.

23          Q       Okay. So, he could have selected  
24    one case and pulled all of the X-rays available  
25    for that case. And then it would be true that

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1 he made no cut of the films from that case;  
2 correct?

3 A Correct.

4 Q And then he could have had access to  
5 a lot of other X-ray films from other cases,  
6 that he didn't send you; right?

7 A Well, yes, obviously.

8 Q So you don't know the universe of  
9 X-rays which Mr. Setter had access to?

10 A And that's my favorite word -- I  
11 don't know anything about the "universe," and it  
12 is driving me up the wall.

13 Q Would that same statement hold true  
14 for all of these groups of cases, "AA" through  
15 "AG"?

16 You don't know the universe of  
17 cases which the defense lawyers had access to  
18 before sending you X-rays?

19 A That is absolutely correct.

20 However, in every case where I  
21 was informed or Otha Linton was informed that no  
22 cuts were made, we included that in the  
23 paragraph. And I'm not sure I can find another  
24 one now, but I'm sure it's here in a couple of  
25 cases.

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1 But, you're right. We have no  
2 knowledge of what the real universe was of  
3 workers exposed to asbestos, who are potential  
4 claimants, as I define the "universe."

5 Q You have no knowledge of the  
6 universe of X-rays that the defense lawyers had  
7 access to, above and beyond just the exposed  
8 worker population; correct?

9 A No knowledge whatsoever.

10 Q All right. And because of that, you  
11 can't say how representative the results of this  
12 study are of asbestos claimants, generally; is  
13 that right?

14 A Yes. But I have learned something  
15 since the paper was published.

16 Q We'll get to that in a moment.

17 A I phrased that, just so you could  
18 maybe allow it later.

19 Q What have you learned since this  
20 paper was published that you were referring to  
21 in your last answer?

22 A You mentioned earlier that you noted  
23 that seven of our initial readers provided a  
24 substantial number of the NIOSH forms in our  
25 492.

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1       defensible estimate.

2               Q       Of the prevalence, the current  
3       prevalence of asbestos-related diseases;  
4       correct?

5               A       And incidence.

6               Q       The next sentence in paragraph 6,  
7       you write:

8                               "We could not and did not make  
9       any claim that films and reports in our survey  
10      are representative of the claimant universe."

11                              Do you still agree with that  
12      statement?

13              A       That's true.

14              Q       You don't have any belief or basis  
15      for knowing whether the 492 claimants you  
16      examined are representative of the claimant  
17      universe as a whole; is that correct?

18              A       Right. We have no basis for making  
19      such a claim.

20              Q       Okay. Turning to Gitlin 12 --

21              A       Aha.

22              Q       -- what is Gitlin Exhibit 12, sir?

23              A       The first page refers to the  
24      "Academic Radiology" publication, December 2004,  
25      letters to the editor; and the -- I guess the

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1 forms and films -- to the attorneys who provided  
2 the raw material for the study.

3 And when you start off with  
4 something close to 100 percent positive, which  
5 is expected in litigation, the claims are --  
6 well, they better be based on positive findings,  
7 whether they're right or wrong.

8 Then there's -- that's what  
9 you test against, independent readings.

10 Q At the bottom of the page, Ducatman  
11 writes:

12 "The solution attributed to me  
13 by Gitlin and colleagues (1) of multiple  
14 readings, is likely to be an improvement; if  
15 used alone, however, it will lead to  
16 under-reading for several statistical reasons."

17 Do you agree with  
18 Dr. Ducatman's conclusion that use of multiple  
19 readings to determine presence of extra changes  
20 caused by exposure to asbestos would lead to  
21 underreading?

22 A I question it, and I would subject  
23 it to scientific investigation.

24 Q So you don't have a strong opinion,  
25 one way or the other, as you sit here right now;